

***United States Court of Appeals
for the Second Circuit***



APPENDIX

76-1337

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket No. 76-1337

B
PS

UNITED STATES OF AMERICA,

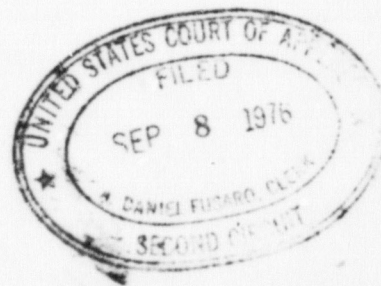
Appellee,

against

NELSON CRUZ,

Defendant-Appellant.

APPENDIX



MORRISON, PAUL, STILLMAN & BEILEY
110 EAST 59TH STREET
NEW YORK 10022

Attorneys for Defendant-Appellant

PAGINATION AS IN ORIGINAL COPY

LIST OF CONTENTS

<u>Description</u>	<u>Page</u>
Docket Entries.	1
Indictment	3
Minutes of Sentencing, February 11, 1976.	7
Judgment and Probation/Commitment Order, dated February 11, 1976	22
Notice of Motion to Reduce Sentence, dated May 20, 1976, and supporting affidavit with exhibits.	23
Letter from Benjamin Zelermeyer to Hon. Marvin E. Frankel, dated June 16, 1976, with attachments. . .	37
Opinion #44730, dated July 8, 1976, denying defendant's motion to reduce sentence and declaring the rights of the parties in the premises.	40
Memorandum amending opinion, dated July 15, 1976. . .	51
Letter from Allen R. Bentley to Hon. Marvin E. Frankel, dated July 22, 1976, with attachments. . .	52
Memorandum opinion dated July 23, 1976.	58
Notice of Appeal dated July 19, 1976.	59

1

JUDGE/MAGISTRATE Assigned Trial 0345 U. S. vs. CRUZ, NELSON

24 11/75 1150

0208 1 District Office

U.S. CODE SECTION 18:371 18:659

OFFENSES

Consp. to steal fr. interstate shipmt.

Theft fr. interstate shipment.

COUNTS 1 2

WAGN. CASE NO. 75-1176

AMT. 1000

10% Deposit

Surety Bond

Collateral

3rd Party Custody

PSA

Allen R. Bentley (212) 791-1957

Benjamin Zelermayer 110 East 57th Street New York City, N.Y. 10022

ARREST

INDICTMENT 11-24-75

WARRANT

TRIAL

SENTENCE

Disposition

Convicted

On All Charges

On Unlawful

Dismissed

AT: Magistrate's Initials

OUTCOME

Dismissed

Held for District GJ

Held to Answer to U. S. District Court

AT: Magistrate's Initials

SEARCH WARRANT

ISSUED

RETURN

SUMMONS

ISSUED

SERVED

ARREST WARRANT

COMPLAINT

11-1-75

INDI-0003

OFFENSE (In Complaint)

Show last names and suffix numbers of other defendants on same indictment/information

Johnson-1; Banks-2; Rubinstein-4.

DATE	PROCEEDINGS	V. Excludable Delay
11-24-75	Filed indictment.	
12-8-75	Deft present (No Atty.) court directs a plea of not guilty be entered. Deft ordered F/P and ROR. Case assigned to Frankel, J. for all purposes...Matzner, J.	
12-12-75	Filed the following papers rec'd from Magistrate Jacobs (Mag#75-1176). Docket Entry Sheet - Criminal Complaint	
12-23-75	Deft, Atty. Benjamin Zelermayer pres., enters a plea of GUILTY as to COUNT #1 of Indictment. P.S.I. ordered. Sentence date set for February 11, 1976. R.O.R. Count Two (2) pen.---FRANKEL, J.	
02-03-76	Filed Deft's Notice of Motion & Affidvt for a recommendation by the Court to the Atty General of the U.S. that Deft not be deported.	
02-09-76	Filed affidvt of Nina Rao Cameron in opposition to a recommendation against deportation.	
02-11-76	Filed Judgment & Commitment Order- The Deft is hereby committed to the custody of the Atty General for imprisonment for a period of TWO (2) YEARS. Deft. is sentenced as a YOUNG ADULT OFFENDER pursuant to Section 5010(b), Title 18, U.S. Code, as extended by Section 4202. It is the intention of this Court that Deft should be deemed eligible for release (Cont'd on Page #2)	

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----x
UNITED STATES OF AMERICA

- v -

WILLIE JOHNSON,
HERBERT BANKS,
NELSON CRUZ, and
CHARLES RUBINSTEIN,

Defendants.

:
: INDICTMENT

: 75 Cr. 1150
:
:

-----x
COUNT ONE

The Grand Jury charges:

1. From on or about the 1st day of June, 1975, up to and including the date of the filing of this indictment, in the Southern District of New York and elsewhere, WILLIE JOHNSON, HERBERT BANKS, NELSON CRUZ and CHARLES RUBINSTEIN, the defendants, did unlawfully, wilfully, and knowingly combine, conspire, confederate and agree together and with each other and with other persons to the Grand Jury known and unknown to commit certain offenses against the United States, to wit, violations of Section 659 of Title 18, United States Code.

2. It was part of said conspiracy that WILLIE JOHNSON, HERBERT BANKS and NELSON CRUZ, the defendants, would unlawfully, wilfully, knowingly and with intent to convert to their own use embezzle, steal, take, carry away and conceal from a motor truck goods and chattels having a value in excess of one hundred dollars (\$100) which were moving as, were part of, and constituted an interstate shipment of freight, express and other property.

3. It was a further part of said conspiracy that the defendant CHARLES RUBINSTEIN would unlawfully, wilfully and knowingly buy, receive and have in his possession such goods and chattels having a value in excess of one hundred dollars (\$100) knowing the said goods and chattels to have been embezzled and stolen.

OVERT ACTS

In furtherance of said conspiracy and to effect the objects thereof, the following overt acts, among others, were committed in the Southern District of New York and elsewhere:

1. On or about October 29, 1975, at 306 West 142nd Street, New York, New York, the defendant HERBERT BANKS spoke on the telephone with the defendant WILLIE JOHNSON.

2. On or about October 29, 1975, at 80 West 170th Street, Bronx, New York, the defendant NELSON CRUZ spoke on the telephone with the defendant WILLIE JOHNSON.

3. On or about October 30, 1975, at about 6:30 A.M., the defendant NELSON CRUZ drove the defendants WILLIE JOHNSON and HERBERT BANKS to the vicinity of 550 West 38th Street, New York, New York.

4. On or about October 30, 1975, at about 6:30 A.M., in the vicinity of 550 West 38th Street, New York, New York, the defendant NELSON CRUZ parked a truck operated by L&J World Distributors, Inc. alongside another truck operated by H.O.T. Delivery Co., Inc.

5. On or about October 30, 1975, in the vicinity of 550 West 38th Street, New York, New York, the defendant WILLIE JOHNSON pointed a gun at the head of the driver of the H.O.T. truck.

6. On or about October 30, 1975, at said location, WILLIE JOHNSON and HERBERT BANKS, the defendants, placed the driver of the H.O.T. truck, who had been handcuffed, into the freight compartment of said truck.

7. On or about October 30, 1975, the defendant HERBERT BANKS drove the H.O.T. truck from the vicinity of 550 West 38th Street, New York, New York, to Jersey City, New Jersey.

8. On or about October 30, 1975, the defendant WILLIE JOHNSON drove a truck operated by LAJ World Distributors, Inc. from New York, New York, to Jersey City, New Jersey.

9. On or about October 30, 1975, in the vicinity of Jersey City, New Jersey, WILLIE JOHNSON and HERBERT BANKS, the defendants, removed the labels from 37 cartons containing cotton piece goods and transferred them from the H.O.T. truck to the LAJ World Distributors truck.

10. On or about October 30, 1975, WILLIE JOHNSON and HERBERT BANKS, the defendants, delivered said cotton piece goods to Milgood Fabrics, Inc. on West 40th Street, New York, New York.

11. On or about October 30, 1975, the defendant CHARLES RUBINSTEIN paid the defendant WILLIE JOHNSON two-thousand one hundred and fifty dollars (\$2,150) for said cotton piece goods.

(Title 18, United States Code, Section 371.)

COUNT TWO

The Grand Jury further charges:

On or about the 30th day of October, 1975, in the Southern District of New York, WILLIE JOHNSON, HERBERT BANKS and NELSON CRUZ, the defendants, unlawfully, wilfully, knowingly and with intent to convert to their own use, did embezzle, steal, take, carry away and conceal from a motortruck

operated by H.O.T. Delivery Co., Inc. goods and chattels having a value in excess of one hundred dollars (\$100), namely, approximately 36 cartons of cotton piece goods, which were moving as, were part of, and constituted an interstate shipment of freight, express and other property.

(Title 18, United States Code, Sections 659 and 2.)

COUNT THREE

The Grand Jury further charges:

On or about the 30th day of October, 1975, in the Southern District of New York, the defendant CHARLES RUBINSTEIN unlawfully, wilfully and knowingly did buy, receive and have in his possession goods and chattels having a value in excess of one hundred dollars (\$100), namely, the repackaged contents of approximately 36 cartons of cotton piece goods which were moving as, were part of and constituted an interstate shipment of freight, express and other property and which had been embezzled, stolen, taken, carried away and concealed as set forth in Counts One and Two of this indictment, knowing the same to have been embezzled and stolen.

(Title 18, United States Code, Section 659.)

FOREMAN

THOMAS J. CAYILL

1 UNITED STATES DISTRICT COURT

2 SOUTHERN DISTRICT OF NEW YORK

3 -----X

4 UNITED STATES OF AMERICA,

5 vs.

6 NELSON CRUZ,

7 Defendant.

8 -----X

75 Cr. 1150

February 11, 1976
10:00 a.m.

9
10 Before: HON. MARVIN E. FRANKEL,
11 District Judge

12
13
14 APPEARANCES

15 THOMAS J. CAHILL, ESQ.
16 United States Attorney for the
Southern District of New York

17 BY: ALLEN R. BENTLEY,
18 Assistant United States Attorney

19
20 BENJAMIN ZELERMYER, ESQ.,
Attorney for the Defendant.

21
22 Also Present:

23 Nina Rao Cameron,
24 Immigration and Naturalization Agency.
25

1 bjm:jt

2 MR. BENTLEY: The government is ready, your
3 Honor.

4 MR. ZELERMYER: The defendant is ready, your
5 Honor.

6 MR. BENTLEY: With me at counsel table is Mrs.
7 Cameron. I would like to introduce her.

8 THE COURT: I knew her before you did. I am
9 pleased to have you introduce her.

10 I assume she is here in connection with the
11 motion effecting the possibility of deportation. I think
12 we can dispose of that first.

13 As I understand the government's position, it is
14 not claimed that Mr. Cruz is subject to deportation at
15 this time because it is not claimed that the first the
16 two offenses to which defense counsel addresses himself
17 was a felony.

18 MRS. CAMERON: Did not involve moral turpitude.

19 THE COURT: Did not involve moral turpitude, and
20 with that understanding there being no effort intended to
21 deport him as the result of the instant offense, and it
22 does not seem to me that there is any justification in
23 the kind of determination that the defendant -- well, I
24 will deny the motion now in any event.

25 I do not see any special appeal in Mr. Cruz's

1 bjmjt 3

2 situation with respect to this most serious crime that
3 would warrant my recommending as a Judge that it not be
4 taken into account for a possible ground for deportation.
5 I know he has been here since he was nine years old or
6 thereabouts, and I know the statute is absurd in that re-
7 spect, but it is not for me to revise the law.

8 Insofar as the law indicates that there is a
9 dispensing power, I do not think it is a case where it
10 is exercised at all.

11 I have read all the papers, and I deny the
12 motion as it is addressed to me now without prejudice
13 however, to any later reconsideration of this subject
14 by some other Judge, me or somebody else, if and when
15 Mr. Cruz should have the misfortune of committing another
16 offense involving moral turpitude as the circumstances
17 may then appear.

18 It may be that this particular case will look
19 different in the light of the history or the next case
20 which I hope does not happen, but in any event, I do not
21 see any occasion for granting a dispensing declaration,
22 if that is what it shall be called at this time.

23 With that, let us proceed to the sentence. I
24 have read the pre-sentence report. I am ready to hear
25 from counsel and the defendant. Mr. Bentley, do you have

1 bjmjt

2 anything to say at this time?

3 MR. BENTLEY: I would merely like to call the
4 Court's attention to the fact that after initially denying
5 involvement in this hijacking, Mr. Cruz did give a state-
6 ment to the F.B.I. and also accompanied the F.B.I. agents
7 to the vicinity of a co-defendant's residence, where the
8 co-defendant was apprehended.

9 To that extent, he has cooperated with the
10 government in this case.

11 THE COURT: Thank you, Mr. Bentley. Mr.
12 Zelermyer?

13 MR. ZELERMYER: May it please the Court, in the
14 two months or so that I have known Nelson Cruz, I have
15 seen him maybe a dozen times. But I think I have gotten
16 to know him a little bit during that time.

17 I too have read, as your Honor has, the pre=
18 sentence report which notes the voluntary statement that
19 Mr. Cruz made to the F.B.I. which notes Mr. Cruz's
20 complete cooperation with the probation office.

21 Mr. Cruz's expressions of remorse, his intelli-
22 gence, the stability of his married life, the commitment
23 to the work ethic, and which describes Mr. Cruz's family,
24 his background, his education, his employment, his prior
25 brushes with the law and the events underlying this

1 bjm,jt

5

2 indictment.

3 I also note the pre-sentence report gives Mr.
4 Cruz a very good rating on the relief guidelines and I
5 think on the whole the report is a fair one. But, as I
6 sat and read the report, I felt that it did not completely
7 describe the Nelson Cruz that I have come to know over
8 these last few months.

9 It did not describe the Nelson Cruz who in his
10 teens attended work camps in Vermont, and learned about
11 the wilderness in this country. And learned to build
12 log cabins from the ground up. It did not describe the
13 Nelson Cruz who began to attend the National Outdoor
14 Leadership Training School as a guest, and wound up as a
15 graduate in 1971, or the Nelson Cruz who has travelled
16 miled up into New York to climb the mountains. It did
17 not describe the Nelson Cruz who played on his high school
18 chess team, and even now discusses with me the match
19 between Fischer and Spassky. He replays the himself to
20 improve his own game. He discusses with a gleam in his
21 eye the sharpness of their play.

22 It does not describe the Nelson Cruz whose
23 preference in music runs to Beethoven or Tschaiowsky
24 which his friends and wife do not understand. It does
25 not describe the Nelson Cruz who has a dream, who has an

bjmjt

6

ambition, a goal. A goal to own his own truck and tractor, and run his own business. Not so much for the mere money or wealth that entrepreneurship can bring, but, more for the ability to buy a house out in the country in Vermont or Connecticut where his whole family can come to live, his wife, their expected child, her mother, his parents.

Why did this Nelson Cruz who loves Beethoven, who plays chess, and who has this dream, why did he participate in this, as your Honor has described it, a most serious crime, and it is? Nelson Cruz is not a wealthy man. Like most of us, he works very hard to make ends meet. He works so hard. As a matter of fact, because he knew he would not be at work during the day today, he got up in the middle of the night to make a run for his employer that he completed at 7 o'clock in the morning to be here on time.

Christmas of 1975 was approaching, and Nelson Cruz did not have money to buy presents for his family when Willie Johnson called and Nelson Cruz was tempted by the opportunity to earn what looked like a few easy dollars to buy presents for his family. He did not know there would be a weapon involved and a driver taken and thrown in the back of a truck and driven to New Jersey.

bjmjt

7

This was not the idea. The whole thing was not his idea. I think the distinction between Mr. Cruz's role in these events, and the role of his co-defendants has been indicated as much as anything by the government's consent to plead to count one of the indictment, for Mr. Cruz to plead to the conspiracy count rather than the substantive offenses. Mr. Cruz is not an experienced criminal. He did not even know how much money he was going to get, and never found out. But he yielded to this temptation.

I think your Honor has seen first hand what this has already done to Nelson Cruz. Your Honor saw when we were here when the plea was entered that when it came time to explain to your Honor why he participated, Nelson Cruz wept openly. I asked him why, why he was crying. He said, "I'm ashamed. I'm ashamed of what I did. I've let my family and this country down. I've let my wife down who depends on me to support her unborn child." I believe your Honor, that Nelson Cruz has exhibited remorse as Mr. Ahearn of the probation office noted in his cooperation with the F.B.I. which Mr. Bentley has confirmed, and his cooperation with the probation department. It would be presumptuous of me to attempt to present to your Honor the goals of our

bjmjt

8

sentencing processing or what factors should enter into your Honor's decision and form that decision. I merely ask that you consider, your Honor, most importantly not just what is written on papers in the pre-sentence report or in the affidavit or in the letters that have been submitted, because those letters, those papers, that black and white typing cannot do justice, cannot describe fully Nelson Cruz.

I ask your Honor to consider whether incarcerating Mr. Cruz at this point in his life, separating him from his wife and his family, would deter anyone else in the world, would deter him or would teach him a better lesson than he has already learned. As Mr. Ahearn put it in the probation report, Nelson Cruz is committed to the work ethic. Would incarceration deepen that commitment or profit society in any way? Nelson Cruz has learned that there is no easy road to achieving his ambition. There is no easy way. He will have to work and work hard to realize his dream. This has not been an experience that Nelson Cruz will soon forget. He will remember it and struggle and I hope and I believe that he will be able to avoid repeating it.

The last several months have been for Nelson Cruz a nightmare. I know that your Honor will be fair.

1 bjmjt

2 I ask no more than that.

3 All Nelson Cruz asks is that the nightmare end
4 so that he can begin once again to take his steps toward
5 realizing his dream. Thank you.

6 THE COURT: Mr. Cruz, you have a right to speak
7 for yourself, now.

8 Is there anything you want to say?

9 THE DEFENDANT: All the people that have been
10 involved with me in the last few months, my family --
11 may I have a drink of water?

12 THE COURT: Why don't you sit down for a second
13 until he gets the water, Mr. Cruz.

14 (Pause.)

15 THE DEFENDANT: The people that have been in-
16 volved with me, the probation officer, the lawyer, my
17 family, and they all really could not understand why I
18 did what I did. I really did not stop to think why I
19 did it.

20 I really did not give it much thought, and by
21 getting depressed and more and how sorry I am that I ever
22 did it. I did not want to have anybody get hurt. I
23 really hurt my family by doing what I did. That's all I
24 have to say.

25 THE COURT: Well, I have listened to what Mr.

1 bjmjt

2 Zelermeyer said. Twice I have seen Mr. Cruz weeping in
3 Court. There are many other appealing things about Mr.
4 Cruz's case, but I am compelled, I think, to order Mr.
5 Cruz in prison, and I will.

6 This is not Mr. Cruz's first encounter with the
7 law. It is at least his third according to the pre-
8 sentence report, and twice having committed offenses
9 that were not trivial as I understand it. You were given
10 your freedom, Mr. Cruz. And then this crime. It simply
11 is not permissible to enter into this kind of crime
12 without thinking, not intending anybody to get hurt, but
13 helping in a situation where somebody could have been
14 killed, for all you knew. When people approach other
15 people with pistols, real or fake, somebody might get
16 killed. That is what you were helping to do. You had
17 a job and you had a family. Somebody asked you to go
18 hijack a truck. You agreed to go along and help in that.
19 I am compelled to send Mr. Cruz to prison.

20 Now, the question is how, and I will solicit
21 the views of counsel on this, Mr. Zelermeyer, it is
22 possible, given Mr. Cruz's age to sentence him as a
23 youth adult offender which might have a benefit, if that
24 is a benefit, of resulting in the end in the youth
25 division, setting aside this conviction if he is released

bjmjt

11

before the maximum time. That might take care of your deportation problem. I am not saying it will but it will be a more acceptable way of dealing with that.

Do you understand what I am saying?

MR. ZELERMYER: Yes, your Honor. I ask that you so sentence Mr. Cruz.

THE COURT: Before I do that, let me say a further thing. Under the guidelines which you have seen, if Mr. Cruz is sentenced as a youth adult offender, it is anticipated or predicted as nearly as we can predict these things that he would get out somewhere in the range of 20 to 27 months.

MR. ZELERMYER: Depending on the period of the initial sentence, to some extent, your Honor.

THE COURT: I suppose that depends in part on the period of the sentence. The youth division normally prefers an indeterminate sentence so they can look and make their own judgement. They do not prefer to be hemmed in by some Judge's specification of a precise period though I have given a specific sentence under these youth provisions.

Knowing that, you might tell me your views on behalf of Mr. Cruz whether considering everything together he would want a specifically prescribed sentence or under

1 bjmjt

12

2 the youth provisions, or whether you want him just com-
3 mitted for the indeterminate term if you had your preference
4 on his behalf.

5 MR. ZELERMYER: Quite frankly, your Honor, I
6 trust your Honor's judgement in this matter better than
7 I trust my own. I will not make a request in Mr. Cruz's
8 behalf in one way or the other.

9 THE COURT: Maybe I spent more time brooding
10 about this than you have, but it may not be a bad idea.
11 I just wanted you to have an opportunity to tell me any-
12 thing you knew or believed before I imposed the sentence.

13 MR. ZELERMYER: I appreciate that, your Honor.
14 I have discussed it with Mr. Cruz. He has expressed no
15 preference. Knowing your Honor's experience in the area,
16 I leave it to your Honor.

17 THE COURT: I wish I could blush in response to
18 that, but this is not a subject where anybody is expert.
19 This is a subject where the parole board has the last word,
20 and they are under a lot of uncertainties about Judges.
21 My own judgement on behalf of Mr. Cruz in this setting is
22 that on balance he is probably better off having a specified
23 sentence, but subject to the provisions of youth adult
24 offenders because at least that gives him reasonable as-
25 surance that there is an outer limit to when he gets out,

bjmjt

13

so I am going to formulate the sentence in those terms.

I am going to commit Mr. Cruz to the custody of the Attorney General for a period of two years. That sentence is imposed under Section 5010 (b) of Title 18 as extended by Section 4209. The judgment will recite that it is the intention of the Court that Mr. Cruz should be deemed eligible for release from custody under Section 5017(c) of Title 18 at any time when the youth division deems such release to be justified under the governing law administered by that division.

Having said that, I suspect that it is not very likely that Mr. Cruz will get out much under 16 months given the guidelines, but the record will show that it is the desire of the Court that his consideration for earlier release be studied thoughtfully and that the youth division not deem itself mechanically or automatically bound by any mathematical computations under the guidelines. It may be that for the reasons Mr. Zelermeyer has spoken of in his sentencing proceeding, Mr. Cruz's positive qualities, his devotion to his work and to his family, his very evident remorse, his ability to sustain himself as a law abiding citizen except for these occasional departures in the past. It may well be that these things should be deemed to justify a decision to release him well before

1 bjm,jt

14

2 the time indicated by the guidelines.

3 I would hope and expect that the youth division
4 will not fail to pay attention to the individual circum-
5 stances of his particular case. You may convey those
6 thoughts to the Board of Parole, its youth division,
7 either by transcript of these remarks or whatever way you
8 deem useful for Mr. Cruz.

9 MR. ZELERMYER: Thank you, your Honor.

10 THE COURT: That is the judgement. Is there
11 an open count?

12 THE CLERK: Count two is open.

13 MR. ZELERMYER: I move to dismiss count two,
14 your Honor.

15 MR. BENTLEY: No objection.

16 THE COURT: That is granted.

17 MR. ZELERMYER: I would ask that your Honor allow
18 at least two weeks for Mr. Cruz to get his affairs in
19 order.

20 THE COURT: Well, two weeks is a somewhat long
21 time. We are on Wednesday now.

22 Mr. Bentley, is there any objection?

23 MR. BENTLEY: There is no objection to a brief
24 period. If it is going to be anything in the nature of
25 two weeks, we would ask for a bail modification, though

1 bjmjt

2 the defendant is presently ROR status.

3 THE COURT: Well, look, I am go. To give Mr.
4 Cruz a week from Monday, until February 23rd at 10:30
5 a.m., to surrender to a marshal in this courthouse.

6 Mr. Cruz, Mr. Bentley said he would like you to
7 put up more bail if you are allowed not to surrender right
8 now. I am not going to require you to put up more bail,
9 but I think your lawyer will agree that I ought to caution
10 you now that if you do not come back, that is a serious
11 federal felony for which you can get up to five years, and
12 the result of that would be both to affect your situation
13 under the sentence I just imposed and to expose you to
14 another prosecution which is a very easy situation for
15 the prosecutor to prove. Do you understand that?

16 THE DEFENDANT: Yes.

17 THE COURT: So you best come back on the day
18 that I have ordered you, February 23rd.

19 THE DEFENDANT: I will come back.

20 THE COURT: All right.

21 (Sentencing concluded.)
22
23
24
25

United States of America vs.

United States District Court for

DEFENDANT

NELSON CRUZ

SOUTHERN DISTRICT OF NEW YORK

DOCKET NO. 75 CR 1150

JUDGMENT AND PROBATION/COMMITMENT ORDER

In the presence of the attorney for the government
the defendant appeared in person on this date

MONTH	DAY	YEAR
FEBRUARY	11	1976

COUNSEL

☐ WITHOUT COUNSEL

However the court advised defendant of right to counsel and asked whether defendant desired to have counsel appointed by the court and the defendant thereupon waived assistance of counsel.

☒ WITH COUNSEL

BENJAMIN ZELERMYER, ESQ.

(Name of counsel)

PLEA

☒ GUILTY, and the court being satisfied that
there is a factual basis for the plea,
as to count 1.☐ NOLO CONTENDERE,☐ NOT GUILTY

There being a finding/verdict of

☐ NOT GUILTY. Defendant is discharged☒ GUILTY.FINDING &
JUDGMENT

Defendant has been convicted as charged of the offense(s) of unlawfully, wilfully, and knowingly combining, conspiring, confederating and agreeing with others to commit certain offenses against the United States, to wit, violations of Section 659 of Title 18, U.S. Code. It was part of said conspiracy that defendant would unlawfully, wilfully, knowingly and with intent to convert to his own use embezzle, steal, take, carry away and conceal from a motor truck goods and chattels having a value in excess of one hundred dollars which were moving as, were part of, and constituted an interstate shipment of freight, express and other property.

The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of TWO (2)

YEARS. Defendant is sentenced as a YOUNG ADULT OFFENDER pursuant to Section 5010(b), Title 18, U.S. Code, as extended by Section 4209.

It is the intention of the Court that defendant should be deemed eligible for release from custody under Section 5011(c), Title 18, U.S. Code, at any time when the Youth Division deems such release to be justified under the governing law administered by that Division.

Count 2 dismissed on motion of defendant's counsel with the consent of the Government.

SENTENCE
OR
PROBATION
ORDERSPECIAL
CONDITIONS
OF
PROBATION

Defendant is released on his own recognizance until February 23, 1976, at 10:30 a.m., at which time he is to surrender to the U.S. Marshal.

ADDITIONAL
CONDITIONS
OF
PROBATION

In addition to the special conditions of probation imposed above, it is hereby ordered that the general conditions of probation set out on the reverse side of this judgment be imposed. The Court may change the conditions of probation, reduce or extend the period of probation, and at any time during the probation period or within a maximum probation period of five years permitted by law, may issue a warrant and revoke probation for a violation occurring during the probation period.

The court orders commitment to the custody of the Attorney General and recommends,

COMMITMENT
RECOMMEN-
DATION

It is ordered that the Clerk deliver a certified copy of this judgment and commitment to the U.S. Marshal or other qualified officer.

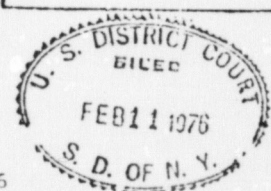
SIGNED BY

☒ U.S. District Judge☐ U.S. Magistrate

Marvin E. Frankel

MARVIN E. FRANKEL

Date February 11, 1976



BEST COPY AVAILABLE

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----x

UNITED STATES OF AMERICA	:	
	:	75 Cr. 1150 (MEF)
-against-	:	
	:	NOTICE OF MOTION
	:	<u>TO REDUCE SENTENCE</u>
NELSON CRUZ,	:	
	:	
Defendant.	:	

-----x

S I R :

PLEASE TAKE NOTICE that upon the annexed affidavit of Benjamin Zelermeyer, sworn to May 20, 1976, and upon all prior proceedings had herein, the undersigned will move this Court, in Room 2704, United States Courthouse, Foley Square, New York, New York, on May 28, 1976, at 9:30 a.m., or as soon thereafter as counsel may be heard, for an Order, pursuant to Rule 35, F.R.Cr.P., reducing the sentence heretofore imposed on defendant Nelson Cruz, and for such other and further relief as the Court may deem just and proper.

Dated: New York, New York
May 20, 1976

Yours, etc.

MORRISON, PAUL, STELLMAN & BEILEY

By

Benjamin Zelermeyer

A Member of the Firm

Attorney for Defendant Nelson Cruz
110 East 59th Street
New York, New York 10022
212/593-0100

TO:

ROBERT B. FISKE, JR., Esq.
United States Attorney for the
Southern District of New York
One St. Andrew's Plaza
New York, New York 10007
Attn: Allen R. Bentley, Esq.
Assistant United States Attorney

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----x
UNITED STATES OF AMERICA :

-against- :

NELSON CRUZ, :

Defendant. :

: 75 Cr. 1150 (MEF)
: AFFIDAVIT IN SUPPORT
: OF MOTION TO REDUCE
: SENTENCE

-----x
STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

BENJAMIN ZELERMYER, being duly sworn, says:

1. I am a member of the Bar of this Court and of the firm of Morrison, Paul, Stillman & Beiley. On December 8, 1975, I was appointed by United States Magistrate Raby to represent defendant Nelson Cruz in connection with this matter. I submit this affidavit in support of Mr. Cruz' motion, pursuant to Rule 35, F.R.Cr.P., to reduce sentence.

2. On December 23, 1975, Mr. Cruz withdrew his plea of not guilty to Count One of the indictment and entered a plea of guilty to that Count, which was accepted by the Court. Count One charged Mr. Cruz and two other defendants with conspiracy to commit interstate theft. On February 11, 1976, the Court sentenced Mr. Cruz to two years' imprisonment under 18 U.S.C. §5010(b), as extended by 18 U.S.C. §4209, and ordered that Mr. Cruz be eligible for release at any time, under 18 U.S.C. §5017(c). Mr. Cruz surrendered and began serving this sentence on February 23, 1976.

3. Shortly after Mr. Cruz had been transferred from the Metropolitan Correctional Center to the United States Correctional Institution in Petersburg, Virginia, I was informed by Mr. Yancy, Mr. Cruz' counselor, that the Bureau of Prisons

believed the sentence imposed by this Court was not permissible under 18 U.S.C. §5010(b). The Bureau's position, as Mr. Yancy related it, was that all sentences under Section 5010(b) are considered indeterminate six-year terms which the courts have no authority to limit. Mr. Yancy also informed me that a letter would be sent by the Bureau to the Court requesting clarification. Last week, I received a copy of the Bureau's letter, addressed to the United States Attorney. A copy is annexed hereto as Exhibit A. (It should be noted that I received my copy, not from the Bureau, but only after I asked Mr. Cruz to obtain one from the records office at Petersburg.)

4. Notwithstanding the fact that this Court had not yet had an opportunity to provide clarification on this subject, the Parole Board has indicated that it intends to disregard the maximum period of imprisonment ordered by this Court. Mr. Cruz informed me on Tuesday that the Parole Board has advised him it will not consider his release before November 1977 and that its determination was based on a six-year indeterminate sentence under Section 5010(b).

5. Thus, unless this Court takes some action, the two-year sentence imposed by this Court will be ignored, and Mr. Cruz may not expect to be released until he has served approximately 21 months, a considerably longer period than those customarily served on two-year sentences. Such a result will also conflict with this Court's expressed desire that Mr. Cruz be considered for early release (Transcript of sentencing, p. 13), a desire which the Parole Board apparently intends to overlook.

6. I believe that the actions of the Bureau and the Parole Board were arbitrary and without justification. This Court's sentence is supported by ample authority. I will be pleased to submit a memorandum of law on the subject if the Court so desires.

7. At this point, however, Mr. Cruz has served nearly three months of his sentence; I respectfully submit that the purposes which may have warranted incarceration have been fully

satisfied and that reduction of the duration of Mr. Cruz' incarceration to the time he has already served is the most appropriate action the Court might take.

8. As articulated in the ABA Standards Relating to the Administration of Criminal Justice, incarceration, which is ordinarily not preferred, may be warranted in order to protect the public from the defendant; to provide correctional treatment; or if a different sentence "would unduly depreciate the seriousness of the offense" (ABA Standards, SAP 2.5[c]).

9. Without presuming to speculate on the specific reasons this Court had in mind in sentencing Mr. Cruz to a term of imprisonment, I submit that continued confinement will accomplish no legitimate end.

10. Annexed hereto as Exhibits B, C, D and E are four letters I have recently received from Mr. Cruz, the last of which, addressed to the Court, Mr. Cruz has asked me to deliver for him. These letters demonstrate better than any argument I might offer that Mr. Cruz is no threat to the public and that he needs no further correctional treatment.

11. Nor will reduction of the duration of Mr. Cruz' imprisonment unduly depreciate the seriousness of the offense he committed: He has been sentenced to incarceration; he has been confined for nearly three months; he has been torn from his family and his community. Reducing the time before his release will not undo these severe consequences.

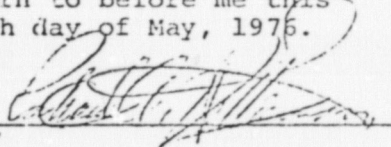
12. As the Court is already aware, Mr. Cruz' wife, Evelyn, is expecting their first child very shortly. Mrs. Cruz informed me last week that her doctor anticipates she will give birth on or before June 16, 1976, less than a month from now. Continuing Mr. Cruz' separation from his family, particularly at the time in their lives when they need each other most, attains

no socially useful objective. Indeed, because Mr. Cruz, while incarcerated, is unable to provide any financial support for his family, society is doubly burdened.

13. For all these reasons, I respectfully urge this Court to modify Mr. Cruz' sentence as follows: reduction of the term of imprisonment to the time he has already served, to be followed by an appropriate period of probation pursuant to 18 U.S.C. §5010(a). This will result in his immediate release, return him to his family, and permit Mr. Cruz the opportunity to become, once again, a useful member of our community.


Benjamin Zelermeyer

Sworn to before me this
20th day of May, 1976.


RICHARD A. WEINER
NOTARY PUBLIC, State of New York
No. 345, 1234
Qualified in New York County
Commission Expires March 30, 1978

United States Attorney
Southern District of New York
U.S. Courthouse, Room 312
Foley Square
New York, New York 10007

Re: CRUZ, Nelson
Reg. No. 02056-158
Cr. 75 CR 1150

Dear Sir:

We recently received Judgement and Commitment (see attachment) from your district on the above listed case. In these orders, the Court found Mr. Cruz suitable for handling under the Youth Corrections Act but also provided that he be committed for a term of two years.

We are writing because of the inconsistency of these two provisions. The shortest possible commitment under the Youth Corrections Act requires conditional release on or before four years from the date of conviction, and unconditional release on or before six years from conviction. 18 U.S.C., 5010 (b), 5017 (c). No shorter commitment is authorized by the Youth Corrections Act. Sections 5010 (c) calls for a further or longer commitment than Section 5010 (b), and Section 5010 (d) removes the young offender from the Youth Act and sentences him under the regular sentencing provisions.

If it was Judge Frankel's intention that Mr. Cruz be treated under the Youth Corrections Act, he should be re-sentenced under Section 5010 (b) without any ceiling to the commitment other than that which is provided by the Act. On the other hand, if the Court's intention is that Mr. Cruz serve no more than a two year sentence, this would imply a finding that the defendant would not benefit from the special treatment provisions of the Youth Corrections Act, and the reference to Section 5010 (b) should be eliminated.

The correction of Mr. Cruz's sentence raises certain difficulties. We are advised by our Office of General Counsel and Review that the problem with omitting the reference to the Youth Corrections Act is that it would deprive Mr. Cruz of certain benefits, the most important of which is the opportunity to have his conviction set aside under 18 U.S.C. 5021. On the other hand, if the reference to the two year maximum is omitted,

Exhibit A

this would open up the possibility of a maximum period of confinement of six years, under the Youth Corrections Act. Since either change is a more harsh sentencing disposition in some respect, our Office of General Counsel and Review feels that corrective action may be taken only after returning Mr. Cruz to Court. His sentence can then be vacated and he can be re-sentenced.

We would appreciate your calling this to the attention of the Court, and advising us.

Sincerely,

Joseph Weaver
Chief Management Support

cc: General Counsel & Review,
N/E Regional Office

E. Haynes, Records Admin
N/E Regional Office

If it was found that Mr. Cruz's sentence was not in accordance with the Youth Corrections Act, he should be returned to Court for a new sentence. The Youth Corrections Act provides that a sentence of imprisonment for a term of less than one year shall be subject to review by the Court. On the other hand, if the sentence is in accordance with the Act, the sentence should be affirmed. The sentence should be affirmed if the sentence is in accordance with the Act and the sentence should not be set aside if the sentence is in accordance with the Act.

The correction of Mr. Cruz's sentence is a difficult task. We are advised by our Office of General Counsel and Review that the problem with correcting the sentence is the Youth Corrections Act is that it would require Mr. Cruz to remain in custody, and the sentence of which is the opportunity to have his conviction set aside under U.S.C. 5. On the other hand, if the sentence is not corrected, the sentence is in accordance with the Act.

4/10/76

Dear Mr. Zelmyer,

How are you, I'm writing this letter to let you know that I'm in good health and doing fine, despite the circumstances.

I'm trying to stay out of trouble, by going to school, I'm learning how to become a machinist, this might be of some use to me in the future. I hope you enjoyed your self on your vacation, I finished the book you gave me and it was fantastic. I'm still playing a lot of Chess with some very good players, I guess you heard from my wife about the mix up with the sentence. I hope everything will be a.k. because I don't want to be here anymore, I really have learned my lesson. I have never been apart from my wife for so long and I miss her very much, I also miss my job a lot.

Just the other day my ~~bro~~ ^{bro} wrote me a letter, they also seem to miss me because they said they hoped I didn't forget how to drive and hoped to see me back at the job soon - I think it is very nice of them to keep in touch with me ---

I shave all ~~my~~^{the} hair from my head and face so if you ever see me you'll never recognize me, well Gustav Zelemger, I'm not so good at writing letters as you can see from my handwriting, so I hope to hear from you soon please take care of your self and your chess game, for we may have a chance to play each other one day (I hope it's soon) untill then.

Yours Truly

Gustav Zelemger

5. If you think I should write to the judge, please let me know some of the things I should say - thank you - also please forgive all these errors in writing

4/19/76

Dear Mr Zelenyer,

I hope that when you receive this note you are in the best of health.

I'm sending you the original sentence computation report for I'm having difficulty making a copy - anyway I know you are very busy, I'm also busy reading ~~and~~ the writing and thinking about my wife, I do hope that everything will work out for the best for me, I spoke with the ~~and~~ counselor (Mr. Yancey) and he said if I got a 2 year sentence that I don't get to see the prob board, he said I would have to do $\frac{1}{3}$ of the sentence, but if I do get a YCA 5010-B (0-6 years) that I ~~as~~ will get to see the ~~to~~ board, at this point I'm very confused and scared at what the outcome might be, I just hope that the motion to reduce sentence to time served ~~will~~ will happen in my favor, because I've really learned my lesson - I hope you will be able to understand the computation ~~and~~ record, because I don't
(over)

not clearly anyway, so please see how you
might be able to help me in doing what
it's best.

Yours Truly

W. C. C.

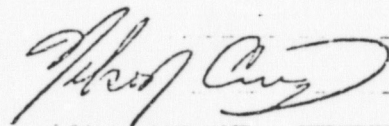
P. S.

I'm still playing chess a lot I still
hope to play you one day even though I
know you are the better player.

5/5/76

Dear Mister Telmayer,
 How are you? I just came from the
 records office and get a copy of the
 letter sent to the courts by the prison.
 I'm sending you this copy for your
 records, so far I've been still keeping
 myself busy and haven't gotten into any
 trouble, I speak with my wife
 frequently and know that she's doing fine,
 but this has been her final month I'm
 being a worried and very excited of becoming
 a father. If you have any suggestions
 as to any names (mainly girls names),
 please let me know, I have a few
 in mind but the more names the
 better it is for ~~us~~ ^{us} to choose.
 Anyway I'm due to meet with the
 Prob. Board sometime this week, I hope
 that the ~~board~~ I'm not sure if the
 board knows how is going to handle
 my case because of the conflict with
 the sentence. I have one of the case
 workers representing me at the meeting.
 Hope to hear from you soon.

Sincerely



5/11/76

Your Honor,

I'm waiting these few words to state my involvement in the institution.

Since the first day I was incarcerated I've been trying to improve myself mentally and physically. Well I have to say that a place such as this really makes a person think, And your Honor it really has given my future a lot of thought. In so doing I've been attending school, doing physical exercise, reading and most of all writing to my lovely wife. I am now training to become a machinist, this institution has the facility to train a person in quite a few constructive fields, and I decided to take advantage.

Your Honor, I've never in my life have ever miss someone so much as I do my wife, especial now that she is about to give birth to our first child. Even though I know that the cause of this is my own stupidity, I can assure you that I will never again get into any trouble with the law, I'm not really the type of person for a life of crime especially now that I'm a father. I have to

set an example for my child, I've already
promised my wife (and I make this promise to
you) that I'm going to dedicate my life
to the bringing up a healthy and intelligent
child, because I would not like for her or she
to be in the same situation I've faced
and paid so dearly for. Your Honor I hope
you take into consideration what this
institutional experience has done for me.
I feel it has changed me for the better,
and I feel that your Honor is responsible
for this change, Thank you.

Sincerely yours

Alfred P. King

June 16, 1976

Honorable Marvin E. Frankel
United States District Judge
United States Courthouse
Foley Square
New York, New York 10007

Re: United States v. Cruz
75 Cr. 1150 (NEF)

Dear Judge Frankel:

I am writing to supplement the Memorandum of Law we filed, at Your Honor's request, on Monday. In that Memorandum we discussed (at p. 11) the Parole Board's position with respect to Cruz' release.

This morning we received, from Mr. Cruz, official Notice of the Parole Board's action. The Notice confirms that Cruz will not be considered for release until November 1977, solely on the basis of the Board's own guidelines, and not because of any determination that Cruz, considered as an individual, needs to be confined that long. This plainly demonstrates that Your Honor's sentencing objectives will not be satisfied by the United States Board of Parole.

For the convenience of the Court, we enclose a copy of the Parole Board's Notice. A copy of this letter, with its enclosure, is also being sent to Mr. Bentley.

Very truly yours,

Benjamin Zelermeyer

BZ/lc
enc.

cc: Allen R. Bentley, Esq.
bc: Nelson Cruz
Evelyn Cruz

UNITED STATES DEPARTMENT OF JUSTICE

United States Board of Parole

Washington, D.C. 20537



Notice of Action

Name Nelson Cruz

Register Number 02056-158-E2 Institution Petersburg

In the case of the above-named, the Board has carefully examined all the information at its disposal and the following action with regard to parole, parole status, or mandatory release was ordered: Continue for Institutional Review hearing in Nov., 1977

REASONS: Your offense behavior has been rated as very high severity because it involved an assault on a victim and hijacking of truck. ~~You have a salient factor score of 9. You have been in custody a total of 3 months. Guidelines established by the Board for youth~~
Conditions or remarks: ~~cases which consider the above factors indicate a range of 20-27 months to be served before release for cases with good institutional program performance and adjustment. After review of all relevant factors and information presented, it is found that a~~

Reasons for denial, continuance or revocation: (Use separate sheet if necessary)

decision at this consideration outside the guidelines doesn't appear warranted.

*Noted
4/9/76
eu*

Appeals procedure: You have a right to appeal a decision as shown below. Forms for that purpose may be obtained from your caseworker, and must be filed with the Chief, Classification and Parole, (or his equivalent) within thirty days of the date this Notice was sent.

- A. Decision of a Hearing Examiner Panel. Appeal may be made to the Regional Director.
- B. Decision of the National Appellate Board referred to it for reconsideration. Appeal may be made to the Regional Director.
- C. Decision of the Regional Director. Appeal may be made to the National Appellate Board.
- D. Decision of Regional Directors in cases where they assumed original jurisdiction. Appeal may be made to the National Appellate Board.

May 28, 1976

(Date Notice sent)

Northeast

(Region - Specify)

mg

(Docket Clerk)

National Appellate Board

(Check)

NOTICE OF ACTION - PART II - SALIENT FACTORS

Case Name Nelson Cruz Register Number 02056-158

Item A -----

1

No prior convictions (adult or juvenile) = 2
One or two prior convictions = 1
Three or more prior convictions = 0

Item B -----

2

No prior incarcerations (adult or juvenile) = 2
One or two prior incarcerations = 1
Three or more prior incarcerations = 0

Item C -----

1

Age at first commitment (adult or juvenile) 18 years or
older = 1
Otherwise = 0

Item D -----

0

Commitment offense did not involve auto theft = 1
Otherwise = 0

Item E -----

1

Never had parole revoked or been committed for a new
offense while on parole = 1
Otherwise = 0

Item F -----

1

No history of heroin or opiate dependence = 1
Otherwise = 0

Item G -----

1

Has completed 12th grade or received GED = 1
Otherwise = 0

Item H -----

1

Verified employment (or full-time school attendance) for a
total of at least 6 months during the last 2 years in the
community = 1
Otherwise = 0

Item I -----

1

Release plan to live with spouse and/or children = 1
Otherwise = 0

Total Score -----

9

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

-against-

BILSON CRUZ,

Defendant,

75 Cr. 1159

OPINION

44730

A P P E A R A N C E S:

Hon. Robert B. Fiske, Jr.
United States Attorney
for the Southern District of New York
New York, New York
Attorney for United States of America

Harrison, Paul, Stillman & Wiley
New York, New York
Attorneys for Defendant
Benjamin Zelenover, Esq.
Of Counsel

FRANKEL, D.J.

Discovering that the Bureau of Prisons and the Parole Commission have decided to "reverse" (and aggravate) the unappealed judgment of this court, the defendant moves for a reduction of his sentence. While the motion may not be the precisely apt technique for cutting the bureaucratic knot, it seems obvious that the defendant is entitled to some relief. The situation and the court's disposition are as follows.

I.

On February 11, 1976, defendant was sentenced by this court to a term of imprisonment ¹ to exceed two years, ² so that defendant would benefit of rehabilitative treatment and the opportunity to have his conviction expunged, the sentence was designed under the Federal Youth Corrections Act, 18 U.S.C. § 5005 et seq. (1970) ("F.Y.C.A."), ³ as amended for "young adult offenders" by 18 U.S.C. § 4101, ⁴ and exact terms of the sentence were as follows:

"The Defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of TWO (2) YEARS. Defendant is sentenced as a YOUNG ADULT OFFENDER pursuant to Section 5010(b), Title 18, U.S. Code, as amended by Section 4109. It is the intention of the court that defendant should be deemed eligible for release from custody under Section 5017(c), Title 18, U.S. Code, at any time when the Youth Division deems such release to be justified under the governing law administered by that Division."

As is evident from the minutes of the sentencing proceeding, the court intended to place a two-year maximum on defendant's confinement. If not released earlier by the Youth Division, defendant, assuming good behavior, was thus scheduled for mandatory conditional release in no longer than nineteen months, see 18 U.S.C. §§ 4161, 4163, and would be unconditionally released after two years.

The Government made no suggestion that there might be a question about the propriety of the sentence then imposed. There was no appeal. Some months later, however, defendant's prison adviser informed him that his sentence was to be something different because the Bureau of Prisons (subject, as is the United States Attorney, or the Attorney General) had determined that the sentence adjudged in February was impermissible. In the Bureau's reported view, the F.Y.C.A. forbids the imposition of any fixed term short of the indeterminate minimum six years to which that Act refers. See 18 U.S.C. § 5017(c).⁵ In effect, under the Bureau's revision of the sentence, defendant has been consigned to a six-year indeterminate term and, accordingly, will not be considered for release until November 1977,⁶ some 21 months after the sentence, notwithstanding that he is eligible for parole pursuant to 18 U.S.C. § 4205(a)⁷ after serving eight months and is required to be released after serving approximately 19 months if he earns the usual "good time" credits. 18 U.S.C. §§ 4161, 4163.

The problem was not formally brought to the court's attention until May 20, 1976, when assigned counsel for the defendant filed the motion now before the court to reduce the sentence to the time thus far served.⁸ The United States Attorney responded by a letter dated June 8, 1976, advising of his now-revoked view⁹ that the court's sentence was indeed invalid.

The court has concluded that the sentence imposed was valid, and that it should not be reduced, even if the sentence were imposed, however, by the Government, having voiced no objection to the sentence of sentencing or by way of a letter with an appeal, and treat it as valid and carry it out according to its terms. See United States v. Olin, 426 F.2d 104, 105 (5th Cir. 1970). Compare United States v. Lane, 204 F.2d 938, 939 (9th Cir. 1956).

The protracted and inconsistent handling of this case by the Department of Justice is a matter obviously to be regretted and corrected. It is not tolerable that the Government's officials before the court should accept a judgment without question only to have other agencies, within the same Department, proceed to nullify it. The impact upon defendants and their sense of justice requires no long essay. The broader effect upon the vital appearance of justice is equally apparent. It must be hoped that cases like this will not recur.

In any event, as has been stated, the Government should not be free to accept a judgment in the courtroom, then revise it in its prisons. While the problem of suitable relief is somewhat involved (see "IV," supra), the court relies upon the responsible officials of the Department of Justice to remedy the Government's improper conduct.

III.

Moving to the merits of the sentence in question, the court has no doubt that the issue raised by the Bureau of Prisons is substantial. Nevertheless, even if the challenge were timely, the judgment would be affirmed.

The United States Attorney now supports the view of the Bureau of Prisons that the sentence imposed herein was improper. At the same time, he responsibly cites four reported cases in which determinate sentences of less than six years have been imposed under the F.Y.C.A. As government counsel further acknowledges, these cases are only a fraction of the total in which similar sentences have been imposed. In this court alone, the number is substantial, though it has not been convenient to ascertain it with precision.

The Youth Corrections Act was "designed to make available for the discretionary use of the Federal judges a system for the sentencing and treatment of persons under the age of 22 years * * * that will promote the rehabilitation of those who in the opinion of the sentencing judge show promise of becoming useful citizens * * *." H.R. Rep. No. 2979, 81st Cong., 2d Sess. I (1950). The major objective was to broaden, not to narrow, the scope of judicial sentencing discretion by providing for individualized rehabilitative treatment for one of the few populations, the young, that may realistically be expected to benefit from it. Id. See also Borawski

v. United States, 413 U.S. 424, 437 (1971). The Act was not intended to "deprive the court of any of its present functions as to sentencing * * *." This view of the Department of Justice reported in S.Rep. No. 1189, 81st Cong, 1st Sess. 16-17 (1949).

It is hard to imagine a sentencing function more basic than the determination of the minimum period of confinement. The Government argues, however, that the Youth Corrections Act must be construed to require the sentencing judge to choose between (1) the power of setting the maximum period of restraint by sentencing a youth as an adult, and thus without the Act's special benefits, and (2) abdication of that ultimate power and committing the youthful offender to the custody of the Attorney General without further instruction. Such a reading is not required by the text of the Act and would do violence to its benevolent purposes.

Section 5010(b), under which the defendant was sentenced, allows the court "in lieu of the penalty of imprisonment otherwise provided by law, [to] sentence the youth offender to the custody of the Attorney General for treatment and supervision * * * until discharged by the Division as provided in section 5017(c) * * *." Section 5017(c) requires the Parole Commission to release an offender sentenced under section 5010(b)

"conditionally * * * on or before the expiration of four years from the date of his conviction and * * * unconditionally on or before six years from the date of his conviction." There is nothing magical about the six-year figure; it is merely the outer limit imposed upon the Parole Commission in the absence of more specific instructions from the court. Neither of the cited sections explicitly prohibits the court from committing a youth to the custody of the Attorney General for a maximum term short of six years. Transferring such a prohibition from the equivocal terms of an Act which was said to "take nothing [in the way of sentencing discretion] away from the court" would pervert the legislative purpose to leave no end other than a drily harsh literalism. Insofar as the text of the F.Y.C.A. gives color to the position of the Bureau of Prisons and the Parole Commission, doubts are to be resolved in favor of lenity. See Bell v. United States, 349 U.S. 81, 83 (1955). The Hobson's choice the Government now finds compulsory for the court cannot be deemed to have been intended by a Congress bent upon preserving the existing sentencing powers of the court while adding a new avenue for humane treatment. See Church of the Holy Trinity v. United States, 143 U.S. 457, 459 (1892).

BEST COPY AVAILABLE

the court's views to the Attorney General and to report to the court and defendant's counsel within ten days whether the Bureau of Prisons and the Parole Commission will administer the judgment in accordance with its terms. Should the situation remain uncorrected or inadequately corrected, defendant's able and energetic counsel may be obliged to bring a different form of proceeding, here or in any appropriate forum, to see that the floating of the judgment is ended.

The foregoing is to declare the rights of the parties in the premises and embodies the court's order on the pending motion.

Dated, New York, New York

July 8, 1976

MARVIN E. FRANKEL

U.S.D.J.

FOOTNOTES:

1. Defendant had pled guilty to conspiracy to violate 18 U.S.C. § 659. The maximum sentence for such offense is a fine of \$5,000 and imprisonment not more than ten years.
2. Defendant was sentenced under the F.Y.C.A. because the court determined that he would "benefit" from the treatment provided" (hereinafter, "treatment"). 18 U.S.C. § 4215 (formerly 18 U.S.C. § 4209 - see note 3 *infra*). In reaching this conclusion, the court was largely influenced by the provisions of the F.Y.C.A. which provides for the suspension of the conviction if the defendant is conditionally discharged before the expiration of the maximum sentence. See 18 U.S.C. § 5021. This opportunity is particularly important to this alien defendant (who is the husband and father of two American citizens) because his conviction, if not set aside, may be grounds for his future deportation pursuant to 8 U.S.C. § 1251(a)(4). An alien is deportable if "convicted of two crimes involving moral turpitude." Although the Second Circuit has not explicitly ruled on the question, cf. *Oliver v. United States Dep. of Justice, E. & H. Serv.*, 517 F.2d 426, 427 n.1 (2d Cir. 1975), it seems that expungement under 18 U.S.C. § 5021 (a) would erase conviction for purposes of 8 U.S.C. § 1251(a)(4). See *Morica v. United States Immigration & Nat. Serv.*, 462 F.2d 1130, 1132 (1st Cir. 1972).
3. Under the Parole Commission and Reorganization Act, Pub.L.No. 94-233, 90 Stat. 213 (March 15, 1976), 18 U.S.C. § 4209 was renumbered as 18 U.S.C. § 4216.
4. Under the changes effected by the Parole Commission and Reorganization Act, *supra*, the Board of Parole has been renamed the United States Parole Commission and all references to the Youth Division in the F.Y.C.A. are replaced by the term "Commission." See 18 U.S.C. §§ 4202, 5005.
5. The Bureau's interpretation was eventually embodied in an undated letter to the United States Attorney from an official designated "Chief Management Support." Neither defense counsel nor the court sent a copy of this communication. A date stamp shows that the United States Attorney received the letter on May 7, 1975. Defense counsel, through defendant's attorney, managed to obtain a copy sometime later from the Bureau's Office of the Interagency Federal Bureau of Investigation. The court has since been provided with copies of this letter by both government and defense counsel.

6. After the instant motion was filed, the Parole Commission in a decision dated May 23, 1976, determined that defendant would not be considered for release prior to November 1977. This determination was apparently made under the guidelines applicable to youthful offenders sentenced for an indeterminate six-year term. See 28 C.F.R. (2.26) (1975).
7. 18 U.S.C. § 4205(a), a provision of the Prison Commission Reorganization Act, not surprisingly, required that a prisoner serving a definite term of more than one year "shall be eligible for release on parole after serving one-third of such term." Prior to March 15, 1976, 18 U.S.C. § 4202, now repealed, contained the same requirement for prisoners, other than juvenile delinquents and committed youth offenders, confined for a definite term or a term of over 180 days.
8. The court is advised that some informal indication of the problem was conveyed by a telephone call from defense counsel to chambers on or about April 5, 1976.
9. The Assistant United States Attorney in charge of the case also offered "to address the question of what action may be taken" if the court should agree that the sentence imposed was invalid.
10. The data provided to the court by the Chief Probation Officer reveal that "determinate sentences" imposed under either § 5016(b) or (d) of the F.Y.C.A. have typically drawn upon the split-sentence device contained in § 5023 of Title 18. The determinate period of confinement is thus usually limited to a maximum of six months, with a period of probation to follow. To be sure, the text of the F.Y.C.A. more easily allows for this type of sentence since it states that nothing in the Act "shall limit or affect the power of any court to accept the imposition or execution of any sentence and place a youth offender on probation or be construed in any wise to amend, repeal, or affect" 18 U.S.C. § 5016. 18 U.S.C. § 5023(a). But the principle is the same: a determinate sentence of less than six years, as provided for in otherwise applicable sections of Title 18, may be combined with a sentence under the F.Y.C.A. The Act also explicitly empowers the court to impose a determinate sentence of greater than six years, limited only by the maximum adult sentence permitted for the offense involved. 18 U.S.C. § 5016(c).
11. Hearings on S. 1114 and S. 2049 before a Subcommittee of the Senate Committee on the Judiciary, 91st Cong., 1st Sess., 69 (1949).

MORRISON, PAUL, STILLMAN
& E

JUL 10 1976

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORKM S L A P
AA RW GP ET FILE

----- x

UNITED STATES OF AMERICA, :

-against- :

NELSON CRUZ, :

Defendant. :

75 Cr. 1150

MEMORANDUM AMENDING
OPINION

----- -x

FRANKEL, D.J.

The Opinion of July 8, 1976, is amended as follows:

At footnote 1, page i, line 3, the figure "\$5,000" is amended to read "\$10,000" and the word "ten" is amended to read "five."

It is so ordered.

Dated, New York, New York

MARVIN E. FRANKEL

July 15, 1976

U.S.D.J.

United States Department of Justice

ADDRESS REPLY TO
"UNITED STATES ATTORNEY"
AND REFER TO
INITIALS AND NUMBER

ARB:jrs

75-3631

UNITED STATES ATTORNEY
SOUTHERN DISTRICT OF NEW YORK
ONE ST. ANDREW'S PLAZA
NEW YORK, NEW YORK 10007

July 22, 1976

Hon. Marvin E. Frankel
United States District Judge
United States Courthouse
Foley Square
New York, New York 10007

Re: United States v. Nelson Cruz,
75 Cr. 1150 (MEF)

Dear Judge Frankel:

Copies of the opinion of the Court dated July 8, 1976, have been sent to appropriate officials in the United States Bureau of Prisons and the United States Parole Commission. This letter is written to report to the Court, as instructed in the opinion, on "whether the Bureau of Prisons and the Parole Commission will administer the judgment in accordance with its terms."

Cruz is now scheduled for an institutional parole review hearing in November 1977, approximately 21 months after his incarceration began. He may be released from custody at that time. In any event, Cruz will not be detained beyond the two-year period fixed in the Court's judgment.

The position of the Bureau of Prisons in cases of this nature is set forth in Bureau of Prisons Policy Statement 7600.58 dated October 9, 1973, copies of which were furnished to the Court and defense counsel on July 19, 1976. Pursuant to paragraph 3(d) of the statement, Cruz will not receive "good time" credit during his incarceration.



ARB:krs
75-3631

The position of the Parole Commission in cases of this nature is set forth in a letter from the office of its General Counsel to Assistant United States Attorney Michael Devorkin dated June 28, 1976, a copy of which is enclosed. In keeping with the considerations outlined in the letter, the Parole Commission is of the view that the sentence imposed on Cruz, and the release and termination of post-release supervision at the two-year point which it apparently compels, preclude the Commission as a matter of law from issuing Cruz a certificate under Title 18, United States Code, Section 5021.

The representations made herein are based on conversations with officials in the office of general counsel of Prisons and the Parole Commission, as well as a review of the documents cited.

Yours truly,

ROBERT B. FISKE, JR.
United States Attorney

By: Allen R. Bentley
ALLEN R. BENTLEY
Assistant United States Attorney

Enclosure

CC: Benjamin Zelermeyer, Esq.
110 East 59th Street
New York, New York 10022

700.58

SUBJECT: PROCEDURES FOR COMMITMENTS TO A TERM OF LESS THAN SIX YEARS UNDER THE PROVISIONS OF THE YOUTH CORRECTIONS ACT

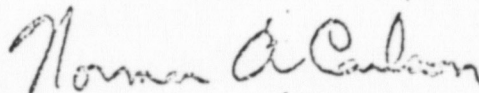
10-9-73

1. BACKGROUND. While it has long been established that commitments to the custody of the Attorney General under the Youth Corrections Act must be under the provisions of 18 USC 5010(b) or (c), and that these commitments must be for a term of 6 years (under 5010(b) and 5017(c), or for a term in excess of 6 years (under 5010(c) and 5017(d), a number of courts have insisted on committing youths to a term of years of less than 6 years under the provisions of the Act.
2. POLICY. Since such commitments are not authorized by the statute, it is the policy of the Bureau of Prisons to call all such situations to the attention of the sentencing court.
- ✓ 3. PROCEDURES. The following procedures should be followed when a commitment of less than 6 years under the YCA is received:
 - a. The Records Officer will prepare, for the Chief Executive Officer's signature, a letter to the United States Attorney for the sentencing district. He will follow the guidelines shown in the appendix, explaining the position of the Bureau, and suggesting possible remedies. Copies of the letter will be forwarded to the Office of General Counsel and Review, through the Central Office Records Administrator, and to the Legal Counsel, U. S. Board of Parole.
 - b. If, after a reasonable period of time and one routine 30 day follow up, no response is received, or, if the sentencing court declines to take remedial action, compute the term as follows:
 - ✓ (1) If the term specified by the court is less than four years, compute the sentence without a mandatory parole date. The full term date should be modified for jail credit and inoperative time, and the resulting date will be the unconditional release date (EXP-FI).
 - (2) If the term specified by the court is more than four years but is less than six years, establish a mandatory parole date at four years from the date of conviction (adjusted for jail credit and inoperative time). The full term date (unconditional release date) will be at the term specified by the court (adjusted for jail credit and inoperative time).
 - c. Immediately after the computation is done, a package, consisting of a copy of the LP-5, a copy of any negative response by the court, or in the absence of a court response, a later copy of the follow up request, will be sent to the Central Office Records Administrator. A similar package will be sent to the Legal Counsel, U. S. Board of Parole.

BEST COPY AVAILABLE

- 2 -

- d. Statutory and extra good time (18 USC 4161 and 4162) will not be applicable to these commitments as release procedures for youth commitments are governed by 18 USC 5017, rather than by 18 USC 4163.
- e. Parole docketing will follow the procedures established for regular YCA commitments.



NORMAN A. CARLSON
Director

United States Department of Justice
United States Parole Commission
Washington, D.C. 20537

June 28, 1976

Mr. Michael S. Devorkin
Assistant U.S. Attorney
One St. Andrews Plaza
New York, New York 10007

Dear Mr. Devorkin:

This is in response to your letter of June 7, 1976, requesting the Commission's position with regard to sentences providing for less than six years confinement which are stated to be pursuant to the Youth Corrections Act. Such sentences pose a number of problems in their effect on the administration of parole.

Taking first the category of sentences which consist of a term of years only (less than the six year term required by 18 U.S.C. § 5010(b)), the net result of such a sentence may well be to defeat the statutory goal of providing a minimum of two years of supervision on parole once the period of confinement is served, 18 U.S.C. § 5017(c), as well as to reduce the chances of early termination of parole supervision on the basis of merit, which the Commission considers to be a prerequisite to issuance of a certificate under 18 U.S.C. § 5021. We should also note that 18 U.S.C. § 5017(b) requires a minimum of one year of supervision before the parolee can be discharged, which further reduces the possibility of a § 5021 certificate in the case of a short sentence.

While the Commission applies its Youth Act guidelines, at 23 C.F.R. § 2.20, ^{1/} to such cases regardless of length of sentence, the prisoner whose guideline range encompasses the total length of his sentence may serve to the full expiration date of his sentence, since the Bureau of Prisons does not apply the good time release statutes (18 U.S.C. §§ 4163/4) to any of the Youth Act sentences. ^{2/}

^{1/} These guidelines provide for shorter suggested ranges of time to be served before release than do the adult guidelines, in almost all cases.

^{2/} In the case of sentences of over four years, the Bureau of Prisons releases the prisoner on mandatory parole as required by 18 U.S.C. § 5017(c).



In addition, the two-thirds release provision of the new 18 U.S.C. § 4206(d) will not apply in most of these cases, since that section applies only to sentences of five years or more.

However, the Commission does consider such prisoners immediately eligible for parole, thus ensuring that in some cases a particular configuration of type of offense, personal background (salient factor score) and sentence length will result in a parole grant and a period of adequate supervision. However, since the time when a particular prisoner is suitable for parole release cannot be precisely determined until a parole hearing has been held (a hearing must be held before 120 days from the start of commitment), the tailoring of individual sentences of this nature to ensure an adequate period of supervision is not a task which can be accomplished with any degree of certainty at the sentencing stage.

In addition we would point out that if parole in a Youth Act case must be revoked, the period of supervision cannot be extended in the case of a willful evader of supervision or of a parolee convicted of a new crime, as can be done with most adult sentences under 18 U.S.C. § 4210(b)(2) and (c). Thus, a shorter period of supervision than the required two years may be of minimum benefit as a protection for the community.

In the case of a split sentence under 18 U.S.C. § 3651, the Commission simply does not consider such prisoners for parole during the term of confinement, in accordance with the presumed intent of the sentencing court that the set period of time be served. Since probation commences upon release, the Commission longer has jurisdiction at that point.

In conclusion, our doubts as to the legality of such sentences are based primarily on the obvious statutory purpose to provide adequate time under supervision for the successful return of the prisoner to the community, (following an appropriate period of confinement) which may be frustrated or thwarted entirely depending on the circumstances of the case and the length of sentence imposed.

I hope this letter will be of assistance to you, and we will be glad to answer any further questions you may have. In addition we are referring a copy of this letter to the Bureau of Prisons for their comment.

Sincerely,

Joseph A. Barry
General Counsel

Michael G. Stover
Michael Stover, Attorney

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----- x
UNITED STATES OF AMERICA, :
 :
Plaintiff, :
 :
-against- : 75 Cr. 1150
NELSON CRUZ, :
 : MEMORANDUM
Defendant. :
----- x

FRANKEL, D.J.

By letter dated July 22, 1976, the United States Attorney stated the position of the Government on the administration of the court's judgment. It appears that those who have Mr. Cruz incarcerated plan to follow their own rather than the court's understanding of the judgment notwithstanding that no appeal was ever taken from that adjudication. Accordingly, as has been indicated, the court anticipates that the defendant's able counsel will proceed promptly to bring an appropriate form of action, here or elsewhere, to compel obedience to the judgment of the court. This is necessary in the court's view, since, as heretofore indicated, the motion for reduction was not an effective device (nor a procedure naming the appropriate defendants) to accomplish the correction deemed necessary.

Dated, New York, New York
July 23, 1976

MARVIN E. FRANKEL

U.S.D.J.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

FILED
DISTRICT COURT

JUL 19 12 00 PM '76

S.D. OF N.Y.

UNITED STATES OF AMERICA :

-against-

75 Cr. 1150 (MEF)

NOTICE OF APPEAL

NELSON CRUZ, :

Defendant. :

Notice is hereby given that defendant Nelson Cruz
appeals to the United States Court of Appeals for the Second
Circuit from the Order of the United States District Court for
the Southern District of New York, dated and entered July 8,
1976.

Dated: New York, New York
July 19, 1976

MORRISON, PAUL, STILLMAN & BEILEY

By

Benjamin Zilman

A Member of the Firm

Attorneys for Defendant

110 East 59th Street

New York, New York 10022

212/593-0100

TO: ROBERT B. FISKE, JR.

United States Attorney

for the Southern District of New York

WARDEN - Cruz # 02056-158

Federal Reformatory P.O. Box 1000

Petersburg, Virginia